TG CHOONG YUAN SDN BHD A

v.

YEAP GEOK KEE SDN BHD

HIGH COURT MALAYA, PENANG B
CHEW SOO HO JC
[CIVIL SUIT NO: 22-138-1994]
20 APRIL 2011

CIVIL PROCEDURE: *Pleadings - Pleading material facts - Failure to specifically plead equitable estoppel or proprietary estoppel - Material facts pleaded indicating that equitable principle should operate to protect plaintiff - Whether defendant prejudiced* C

CONTRACT: *Privity - Defendant not party to tenancy contract - Some of terms intended for defendant's benefit - Whether defendant could commence action* D

LAND LAW: *Estoppel - Proprietary estoppel - Plaintiff encouraged by defendant to erect shop lots on defendant's land at plaintiff's own cost - Plaintiff under expectation that plaintiff could occupy shop lots on payment of monthly ground rental until plaintiff and defendant jointly developed land - Whether plaintiff was actual or beneficial owner of shop lots - Whether plaintiff entitled to lease of land in equity - Whether lease of unspecified duration created in plaintiff's favour - Whether plaintiff's equity in buildings protected - National Land Code, s. 221(3)(b)* E F

The plaintiff claimed that sometime in 1986 or 1987, the defendant through its directors Yeap Geok Kee (YGK) and Yeap Boon Lee (YBL) had encouraged the plaintiff to build 13 shop lots at the plaintiff's own costs and expenses on a piece of land ('the said land') owned by the defendant. The plaintiff was under an expectation that the plaintiff could occupy the shop lots on payment of monthly ground rental to the defendant until the plaintiff and the defendant jointly developed the said land. The said land was in front of a premises known as No. 388-A. Subsequently, YGK, the chairman and director of the defendant had signed all the layout and building plans for the shop lots for submission to the local authority (MPPP) for approval. The buildings were completed before the approval of the plans had been granted by MPPP and the defendant had not objected to the construction. The defendant had collected monthly ground rent for the shop lots. MPPP meanwhile disapproved the plans G H I

A and had requested a fresh set of the plans for their reconsideration. The defendant however refused to sign the new plans. YGK and YBL had since passed away and the present directors of the defendant were DW1 and DW2. Sometime in 1989, MPPP had charged the defendant in the Magistrate's Court
B for erecting the shop lots without its approval. The defendant pleaded guilty to the said charge and a 'Mandatory Order' was made ordering the defendant to demolish the shop lots. The proceedings in the Magistrate's Court was in the absence of the plaintiff. The plaintiff thus contended that it was denied the right
C of being heard and the said Mandatory Order was invalid and of no effect in law. The plaintiff thus sought, *inter alia*: (i) a declaration that the plaintiff was the actual owner of the shop lots; (ii) an order that the defendant signed the plans; and (iii) an order that the defendant signed a lease for the said land. The defendant
D contended that there was a tenancy agreement dated 2 September 1987 (exh. P4) which involved the letting of 19,000 sq. ft. of the said land to the plaintiff and this tenancy had expired by 30 September 1993. Hence, upon its expiry, the tenancy ceased and the plaintiff would have no right to remain on the land. The
E plaintiff however contended that P4 was an agreement of tenancy between YBL and the plaintiff over premises No. 388-A for which YBL was the beneficial owner and not the said land which belonged to the defendant. The defendant alleged that the agreement entered into by YBL and the plaintiff on 2 September
F 1987 was wrongful and unlawful as YBL did not obtain any authorisation from the Board of Directors of the defendant. The defendant stated that they did not know and did not allow or encourage the plaintiff to build the shops without the approval of the MPPP. The defendant counterclaimed for vacant possession
G and for an account for all profits and incomes made from the premises. The issues arising for determination were whether the plaintiff was the actual or beneficial owner of the shop lots and was in equity entitled to a lease of the said land and whether the 'Mandatory Order' was valid.

H

Held (allowing the plaintiff's claim with costs and dismissing the defendant's counterclaim with costs:

(1) There had been encouragement by YGK and YBL to SP1 as
I director of the plaintiff to build the said buildings at the plaintiff's own costs and expenses on the said land. YGK for and on behalf of the defendant had signed all the plans for

submission to the MPPP for approval which indicated conclusively the assent and encouragement by the defendant to the plaintiff to build the shop lots. (para 13)

(2) The defendant being a third party to the contract tenancy P4 could not enforce the contract even if it was made or some of the provisions in P4 were intended for its benefit. Consequently, the defendant's purported action basing on the terms and conditions in P4 which included the right to extend or terminate it was wrong in law and of no effect which ought to be rejected; *Kepong Prospecting Ltd & Ors v. Schmidt*; (refd); *Punca Klasik Sdn Bhd v. Foh Chong & Sons Sdn Bhd & Ors*; (refd). (para 15)

(3) Although the plaintiff had pleaded protection under equity, the doctrine of equitable estoppel or proprietary estoppel were not specifically stated. However, the facts pleaded showed that the defendant's then directors' encouragement had induced the plaintiff to build the shop lots at their own costs and expenses under the expectation that the plaintiff could use and/or let out the premises until such time when they could develop jointly the said land. Hence, the plaintiff had pleaded material facts indicating that equitable principle should operate to protect the plaintiff and to do justice to the case. The defendant was not prejudiced at all. A lease had indeed existed between the plaintiff and the defendant over the said land and both the plaintiff and defendant were bound by such lease for the period as stipulated in s. 221(3)(b) of the National Land Code which is 30 years. (para 16)

(4) The fact that the defendant had offered to rent that portion of the said land to the plaintiff to build, upon payment of ground rental, and the plaintiff had accepted by building and paying the agreed ground rent, established clearly a concluded contract. Since the defendant did not stipulate the duration of the tenancy, pursuant to s. 221(3)(b), it created a lease of 30 years. (para 16)

(5) If the 'Mandatory Order' were to be carried out, it would defeat the equity which protected the plaintiff's right over the said buildings and the whole of the plaintiff's claim would fail as the substratum of their whole claim would no longer be in existence. MPPP had requested the resubmission of the same

A set of building plans etc, for consideration. If the defendant had signed the same set of the plans for the resubmission at the material time, MPPP would probably have approved them to render the buildings legal structures. It was therefore inequitable to allow the 'Mandatory Order' to stand to defeat
B the equity that was in favour of the plaintiff. It was only just and equitable that the Order be suspended until the resubmission and final consideration of the building plans etc, by the MPPP. (para 24)

C **(6)** It was unjust and inequitable for the defendant to have vacant possession of the said land. It was utterly unjust and inequitable for the defendant to allege trespass by the plaintiff when the defendant had encouraged and allowed the plaintiff to build and occupy the said land. Consequently, the issue of
D damages for trespass did not arise. (para 25)

Case(s) referred to:

Crabb v. Arun District Council [1976] Ch 179, [1975] 3 All ER 865 ***(refd)***
Dillwyn v. Llewelyn (1862) 4 De GF & J 517 ***(refd)***
Dunlop Pnuematic Tyre Co Ltd v. Selfridge & Co Ltd [1915] AC 847 HL
E ***(refd)***
Grant v. Edwards [1986] 2 All ER 426 ***(refd)***
Greasley v. Cooke [1980] 3 All ER 710 CA ***(refd)***
Kepong Prospecting Ltd & Ors v. Schmidt [1967] 1 LNS 67 PC ***(refd)***
Punca Klasik Sdn Bhd v. Foh Chong & Sons Sdn Bhd & Ors [1998] 1 CLJ
F *601 HC* ***(refd)***
Scruttons Ltd v. Midland Silicones Ltd [1962] AC 446 HL ***(refd)***
Tan Leng Choo & Ors v. Law Teck Huat [2008] 1 LNS 568 CA ***(refd)***
Taylor Fashions Ltd v. Liverpool Victoria Trustees Co Ltd [1981] 1 All ER 897 ***(refd)***
Tweddle v. Atkinson (1861) 1 B & S 393 ***(refd)***
G *Willmott v. Barber [1880] 15 Ch D 96* ***(refd)***
Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(refd)***
Yong Tong Hong v. Siew Soon Wah & Ors [1971] 1 LNS 161 FC ***(refd)***

Legislation referred to:

H Evidence Act 1950, ss. 17, 18, 19, 20, 31, 32(1)(b)
National Land Code, s. 221(2), (3)(b)
Street, Drainage and Building Act 1974, ss. 70(13)(c), (15)

For the plaintiff - Sunny Khoo; M/s Sunny Khoo & Co
For the defendant - Gurbachan Singh; M/s Bachan & Kartar
I

Reported by Amutha Suppayah

JUDGMENT

Chew Soo Ho JC:

Brief Facts

[1] Sometime in the year 1986 and/or 1987, upon the encouragement by the defendant through its directors, Mr Yeap Geok Kee and Mr Yeap Boon Lee to the plaintiff to build thirteen shop lots and a toilet at the plaintiff's own costs and expenses on the land known as Lot 32, Daerah Timur Laut, Bandar Batu Feringghi, Pulau Pinang (hereinafter referred to as 'the said land') of which the defendant is the registered owner with the expectation that the plaintiff was allowed to occupy the said thirteen shop lots and the toilet on payment of monthly ground rental to the defendant until the plaintiff and the defendant have jointly developed the said land, the plaintiff had acted to its detriment by constructing the thirteen shop lots and the toilet on the said land at its own costs and expenses sometime in early 1988. The relevant portion of the said land was in front of a premises known as No. 388-A Batu Ferringghi, Daerah Timur Laut, Pulau Pinang. This encouragement to build and occupy the said land was as a consequence of the plaintiff having assisted Mr Yeap Geok Kee financially to enable him to settle the arrears owed to the land office. The then chairman and director of the defendant, Mr Yeap Geok Kee, had consequently, signed all the layout and building plans for the thirteen shop lots and the toilet prepared by the firm of architects known as Akitek Akiprima Sdn Bhd, for submission to the local authority (MPPP) for approval. While waiting for the MPPP's approval, plaintiff had commenced construction and completed the buildings in the same year in 1988. The plaintiff asserted that all the then three directors of the defendant namely Mr Yeap Geok Kee, Mr Yeap Boon Lee and Mr Yeap Boon Yeam (DW1) were aware that the buildings were completed before the approval of the plans had been granted by MPPP and the defendant had not at all material time objected to or stopped the plaintiff from the construction. The defendant had, in fact, been collecting the monthly ground rent for the thirteen shop lots and the toilet from the plaintiff at the initial rate of RM1,300 per month which was subsequently increased to RM1,500 per month. The plaintiff had been in possession of the thirteen shop lots and toilet and had let out the shop lots to respective tenants. MPPP meanwhile disapproved the plans submitted but upon the plaintiff's appeal to the Chief Minister's

Office, MPPP replied on 8 May 1995 (bundle B pp. 113-114) which was copied to the plaintiff requesting the plaintiff to submit a fresh set of the same plans for their reconsideration. Through a letter dated 22 September 1993, the plaintiff's solicitors had then sent the plans and all relevant forms of MPPP to the defendant through its solicitors for signature by the defendant's authorised director for purpose of resubmission to the MPPP for approval. However, *vide* a letter dated 29 September 1993, the defendant's solicitors replied that the defendant refused to sign all those documents. The directors of the defendant Mr Yeap Geok Kee and Mr Yeap Boon Lee had since passed away and the subsequent and present directors of the defendant are Mr Yeap Boon Yeam (DW1) and his son Mr Yeap Ban Liang (DW2), they refused to sign those plans.

[2] Sometime in 1989, MPPP had charged the defendant in the Magistrate's Court Georgetown *vide* Summons No. 87(97)-7-89 for erecting the thirteen shop lots and the toilet without its approval. The defendant had pleaded guilty to the said charge. Consequently a 'Mandatory Order' (Perintah Termesti) dated 24 July 1991 which ordered the defendant to demolish the said thirteen shop lots and toilet, was issued by the Magistrate's Court. The proceedings in the Magistrate's Court was in the absence of the plaintiff. The plaintiff thus contended that it was denied the right of being heard and the said 'Mandatory Order' was invalid and of no effect in law.

[3] Therefore, the plaintiff claimed for a declaration that the plaintiff is the actual owner of the thirteen units of shop lots and the toilet erected at the front of premises No. 388-A, Batu Ferringghi, Daerah Timur Laut, Pulau Pinang on the said land; an order that the defendant through its director or authorised representative, within 30 days from the date of the order, as owner of the said land, signs on all copies of the site and location plans, section and elevation plans (front view) and (back view), floor plans and MPPP's forms for the shop lots and the toilet for the approval by MPPP; an order that in the event the defendant fails to sign the said plans and/or documents, the Senior Assistant Registrar of this court is given the power to sign those documents/plans and/or other relevant documents/plans; an order that the defendant shall sign as the lessor of a lease (Form 15A National Land Code) for that part of the said land where the shop lots and toilet were erected with the plaintiff as the lessee for a

duration of 24 years from the date of this order with payment of monthly rental at a reasonable rate fixed by the court, in satisfaction of the equity for the plaintiff; *inter alia*.

[4] The defendant alleged that the agreement entered into by its previous director, Mr Yeap Boon Lee and the plaintiff on 2 September 1987 which the plaintiff contended was in respect of premises No. 388-A, Batu Ferringghi, Daerah Timur Laut, Pulau Pinang, was wrongful and unlawful as Yeap Boon Lee did not obtain any authorisation from the Board of Directors of the defendant. Nevertheless, in order to avoid embarrassment to Yeap Boon Lee who was also a relative to the directors of the defendant, the defendant decided to be bound by the said agreement. Apart from this agreement, there was no other agreement between the plaintiff and the defendant. The defendant averred that the said agreement had nevertheless expired on 30 September 1990 but the plaintiff was allowed to continue to occupy the said land for a further period of three years until 30 September 1993. However, in spite of the fact that the defendant had through its solicitors served a reminder and a notice on the plaintiff that the agreement will come to an end by 30 September 1993 and that the plaintiff and its tenants would have to deliver vacant possession of the premises on the said land on or before 30 September 1993, the plaintiff refused and neglected to deliver vacant possession of the said land and premises to the defendant and is still occupying the same without payment of rental since 1 October 1993. The defendant denied that the plaintiff had any equity over that part of the said land nor was there any encouragement or understanding that the plaintiff was allowed to occupy the said land beyond the tenancy period but insisted that the only right of the plaintiff was pursuant to the said agreement dated 2 September 1987. The defendant stated that they did not know and did not allow or encourage the plaintiff to build thirteen shops and a toilet without the approval of the MPPP. MPPP had in fact in 1987 or 1988 demolished the shops that the plaintiff was building on the said land without approval. The defendant further denied that the late Yeap Geok Kee had received the sum of RM45,000 and RM275,000 respectively from the plaintiff to settle the quit rent and his debts since there was no company resolution to that effect. The defendant alleged that Yeap Boon Lee was never authorised to act on behalf of the defendant and that it had no knowledge or record of the letter written by Yeap Boon Lee dated 3 October

1987 to the plaintiff confirming the receipt of the two sums. On account of the plaintiff's continuous occupation of the said land, the defendant was prevented from selling it or using it for their benefit and hence suffered great losses. It was also alleged that the plaintiff did not pay the increase in the quit rent and annual assessment for a period of three years since the signing of the agreement in the total sum of RM13,698.50 as at 30 September 1993. Therefore, the defendant counterclaimed for vacant possession, an account for all profits and incomes made from the premises, all incomes generated from the premises to be surrendered to the defendant, the sum of RM13,698.50 pursuant to cl. 3(a) of the said agreement, damages for trespass of the said land and costs.

The Issues

[5] The issues upon the facts of this case can be deduced to the following:

(1) Whether the plaintiff is the actual or beneficial owner of the thirteen shop lots and a toilet erected by the plaintiff upon alleged encouragement by the defendant on the said land in front of premises No. 388-A, Batu Ferringghi, Daerah Timur Laut, Pulau Pinang and in equity is entitled to a lease of the said land where the thirteen shop lots and the toilet were erected from the defendant;

(2) Whether the 'Mandatory Order' issued by the learned Magistrate of Penang on 24 July 1991 is valid;

(3) Whether the defendant has proved its counterclaim that it is entitled to vacant possession of the said land, an account of income received from the thirteen shop lots, the sum of RM13,698.50 being the increase in quit rent that the plaintiff had failed to pay pursuant to cl. 3(a) of the said agreement dated 2 September 1987, damages for trespass, *inter alia*.

Evaluation And Findings

First Issue

[6] From the statement of agreed facts marked as bundle D, it has been agreed by both parties, *inter alia*, that the defendant is the registered owner of the said land and plaintiff had built thirteen shop lots and a toilet at the front of the said land. It is thus an admitted fact that the thirteen shop lots and the toilet erected on

the said land were actually built by the plaintiff and thus it is undisputed that the plaintiff is the owner of the thirteen shop lots and the toilet physically. Evidence of SP1, the director of the plaintiff, shows that sometime in 1986 or 1987, the defendant through its directors had encouraged the plaintiff to build the thirteen shop lots and a toilet on the said land at the plaintiff's own costs and expenses with the anticipation or expectation that the plaintiff would be permitted to occupy the said thirteen shop lots and the toilet upon payment of ground rent to the defendant until both parties could jointly develop the said land. At that material time, the then director of the defendant, Mr Yeap Boon Lee who was a teacher in Sekolah Rendah Perempuan Cina Pulau Pinang where SP1 was the Chairman of the Persatuan Guru-Guru dan Ibubapa had approached SP1 knowing that the plaintiff's company was a developer and a contractor to inform SP1 that the defendant intended to sell the said land because at the material time, the defendant was owing quit rent of the said land and there was a possibility that the said land would be forfeited by the Penang Authority. Yeap Boon Lee had also informed SP1 that he was one of the directors of the defendant together with his father Yeap Geok Kee who was the chairman and Yeap Boon Yeam (DW1) and they were also the shareholders. Yeap Boon Lee initially offered to sell the said land to the plaintiff at the price of RM28 per square foot which SP1 felt to be too high and asked for time to consider but subsequently Yeap Boon Lee saw SP1 in the plaintiff's office and offered to rent out the front portion of the land in Lot 32 measuring 19,000 sq. feet to the plaintiff at RM1,000 per month. SP1 was informed by Yeap Boon Lee that the defendant was owing about RM20,000 to RM30,000 of quit rent for the said land and intended to let out the front portion of the said land to obtain about RM10,000 to pay towards the arrears of the quit rent. Plaintiff agreed to accept the offer to rent the said front portion of the said land to build the thirteen shop lots and the toilet. In the subsequent meeting with Mr Yeap Geok Kee, the chairman of the defendant as arranged by Yeap Boon Lee, Yeap Geok Kee also agreed for the defendant to rent the said portion of the said land to the plaintiff and suggested to SP1 to appoint an architect to build the thirteen shop lots and the toilet on that portion of the said land. Yeap Boon Lee also gave two copies of the site plan of the said land to SP1 for the architect for that purpose. Subsequent to that, Yeap Boon Lee and SP1 went to a firm of architect known as Akitek Akirprima Sdn Bhd where a copy of the site plan was handed to architect,

Mr Chow and a discussion was held in relation to the construction of the thirteen shop lots and the toilet. The architect confirmed that the thirteen shop lots and a toilet could be built at the front portion of the said land. Later, the relevant plans were drawn up by the architect; the chairman of the defendant, Mr Yeap Geok Kee who encouraged the plaintiff to build, signed all the plans for the purpose of submission to MPPP for approval. Thereafter, the architect submitted the plans to MPPP. While waiting for the approval, sometime in early 1988, plaintiff had commenced to build the thirteen shop lots and the toilet at its own costs and expenses principally to cater for the PATA 1988, a tourism year. According to SP1, throughout the construction of the thirteen shop lots and the toilet till their completion, the defendant's directors, Yeap Geok Kee, Yeap Boon Lee and Yeap Boon Yeam (DW1) did not stop the plaintiff at any time although they knew that approval from MPPP had not been obtained. In fact, the defendant had been receiving monthly rental from the plaintiff at RM1,300 per month and later at RM1,500 per month for that front portion of the said land.

[7] The shop lots except lot 5 and lot 6 had been let out to tenants by the plaintiff till the trial date.

[8] MPPP had, according to the plaintiff, wrongly rejected the development plans submitted in relation to the thirteen shop lots and the toilet because all relevant departments involved in approving had given their respective approval to the said building plans. As a consequence of such rejection and after the plaintiff's appeal, the plaintiff through its solicitors wrote to the defendant's solicitors enclosing a fresh set of the plans and the MPPP forms for signature by the defendant for the purpose of resubmission to MPPP for approval. However, the defendant declined and refused to do so.

[9] The defendant's main contention in defence is that there was a tenancy agreement dated 2 September 1987 (exh. P4) which involved the letting of the said 19,000 sq. ft. of the said land to the plaintiff and this tenancy had expired by 30 September 1993 after an extension of three years. Hence, upon its expiry, the tenancy ceased and the plaintiff would have no right to remain on the land. The plaintiff however contended that P4 was an agreement of tenancy between Yeap Boon Lee and the plaintiff over premises No. 388-A, Batu Ferringhi, Penang for which Yeap Boon Lee was the beneficial owner and not the land which

belonged to the defendant. According to SP1, when renting premises No. 388-A from Yeap Boon Lee, the defendant's chairman Yeap Geok Kee also consented to allow the plaintiff to build the thirteen shop lots and a toilet in front of premises No. 388-A as a development because Yeap Geok Kee had received money amounting to RM45,000 and RM275,000 respectively from SP1 to settle the arrears due to the local government and Yeap Geok Kee's personal debts. In brief, the plaintiff is contending that the agreement P4 and its building of the thirteen shop lots and a toilet on the land at the front portion of premises No. 388-A upon consent by Yeap Geok Kee and Yeap Boon Lee acting for the defendant are separate issues and distinct from the tenancy agreement P4.

[10] From the facts and evidence as well as the contentions by both parties, although DW1 first contended that the tenancy agreement P4 was wrongful and unlawful because Yeap Boon Lee did not obtain the authorisation from the Board of Directors of the defendant, he nevertheless resiled by accepting it to be valid to avoid embarrassment. Hence, this court finds as a fact that P4 is admitted by both parties to be a valid tenancy agreement. It is thus appropriate to deal with the tenancy agreement P4 whether it was an agreement for the tenancy of premises No. 388-A only as contended by the plaintiff or it was a tenancy agreement for the 19,000 sq. ft. of land in the front portion of the premises as contended by the defendant. Looking at P4 assiduously, this agreement was entered into between Yeap Boon Lee in his personal capacity with the plaintiff company. The signatories at p. 5 of P4 also indicates that Yeap Boon Lee signed in his own capacity without the company stamp of the defendant being used whereas Cheah Guan Hin, SP2 signed for and on behalf of the plaintiff company as expressly stated therein. At p. 1 of this agreement P4, para. 2 and 3 state:

> Whereas the Landlord is the beneficial owner with a restaurant bearing No. 388-A, Batu Ferringhi, Penang with a compound of an approximately area of 19,000 sq. ft. as shown in the plan coloured 'yellow' hereto annexed (hereinafter referred to as 'the demised premises') erected on part of Lot 32, Bandar Batu Ferringhi, Sec 1, Penang (hereinafter referred to as 'the said land').
>
> And whereas the registered proprietor of the said land is Yeap Geok Kee Sdn. Bhd. (hereinafter referred to as 'the said Land owner') with the registered office at No. 24, 1st Floor, Jalan Talipon, Penang.

[11] Under cl. 1 therein, it states that the landlord, Yeap Boon Lee lets and the tenant, Choong Yuan Realty Sdn Bhd takes the whole of the demised premises for a term of three years commencing from 1 October 1987. The 'demised premises' and 'the said land' are as referred to in the preamble at para. 2 and 3 above. Clause 1, by confining to "the demised premises" and excluding "the said land" which is that part of Lot 32 where the premises was erected indicates unequivocally that P4 is in relation to the premises No. 388 – A only. The fact that the 19,000 sq. ft. was mentioned, in my view, was a consent that the plaintiff could perhaps use this area of land which was within the premises. In any event, Yeap Boon Lee in his personal capacity could not grant a tenancy of the said land to the plaintiff when he was not the sole proprietor of the said land.

[12] From what had been expressed in the above quoted two paragraphs in P4, it is amply clear to this court that no doubt "the landlord" referred to in this agreement ie, Yeap Boon Lee as reflected in the first paragraph of p. 1 in P4, was the beneficial owner of premises No. 388 – A with a compound of about 19,000 sq. ft. erected on the said land, Yeap Boon Lee was not the registered owner of the said land where his premises No. 388-A was erected including the 19,000 sq. ft. of land because the registered proprietor was specifically made known in the preamble of this agreement to be the defendant. The fact that the registered owner of the said land with the 19,000 sq. ft. inclusive was made known in the agreement P4 shows none other than telling the tenant (the plaintiff) that the tenancy was in relation to the premises No. 388-A which Yeap Boon Lee was the beneficial owner but not in respect of the portion of the said land which belonged to the defendant, the registered owner. Moreover, Yeap Boon Lee, not being the registered proprietor of the 19,000 sq. ft. or any part thereof nor the registered owner of the said land pursuant to s. 304 of the National Land Code, was in no capacity in law to grant a tenancy of the said land or that part of the said land to the plaintiff bearing in mind that he did not sign P4 as a director of the defendant but in his own name. It is thus to this court untenable in law for the defence to argue that the said tenancy agreement P4 was a tenancy for the 19,000 sq. ft. of the said land in front of premises No. 388-A. Some receipts were issued to the plaintiff for the payments of the rental as in bundle B pp. 92-104 but the receipts do not state particularly that the payments were for the ground rent of the portion of land

where premises No. 38-A was erected and its compound. Whatever may be the payments, the salient fact that remains is that Yeap Boon Lee as a party in his personal capacity in the said agreement P4, and not being the registered proprietor of the land where premises No. 388-A was erected and the 19,000 sq. ft. of compound of premises No. 388-A, had no capacity to grant a tenancy of the land to the plaintiff *vide* P4. Looking in that light, I hold that P4 is not and cannot be a tenancy agreement for the 19,000 sq. ft. of land as defendant being the land owner was not the contracting party and is thus not privy to P4.

[13] Reverting to the issue of whether the plaintiff by erecting the thirteen shop lots and the toilet on the front portion of the land in front of premise No. 388A is protected by equity. From the facts of the case and the evidence of the plaintiff through SP1, there had been encouragement by the then chairman and director of the defendant, Yeap Geok Kee and Yeap Boon Lee to SP1 as director of the plaintiff to build the said buildings at the plaintiff's own costs and expenses on the said land of the defendant in front of premises No. 388-A for which the plaintiff was renting upon payment of ground rent separately from P4. Upon a finding of facts, I accept the evidence of SP1 that there was such an encouragement and consent from the conduct of Yeap Boon Lee and Yeap Geok Kee as chairman and director cum shareholders of the defendant coupled with the fact that Yeap Geok Kee, for and on behalf of the defendant had signed all plans prepared by the architect, Akitek Akiprima Sdn Bhd, for submission to the MPPP for approval which indicates conclusively the assent and encouragement by the defendant to the plaintiff to build the thirteen shop lots and the toilet as shown in the said plans (bundle B pp. 123-126). Such consent and encouragement were also shown in P4 where the plaintiff agreed to build stores and to rent them out for business while Yeap Boon Lee would sign all plans for the building of the stores when requested by the plaintiff. Hence, it is profoundly illogical for the defendant through SD1 to say in evidence that there was no such encouragement or assent to the plaintiff to build the said buildings on that part of the said land. SD1 was also the director of the defendant at the material time. If there was no such encouragement or assent, SD1 being the director could have acted to stop the plaintiff but he did nothing. SD1 said at his examination-in-chief that the said thirteen shop lots were demolished by MPPP in 1988 to attempt to substantiate his contention of lack of encouragement or consent

but from my finding of facts, there is absolutely no evidence except his own bare assertion which is a probable untruth of the MPPP having demolished the buildings in 1988. If his assertion is true, how could the said thirteen shop lots and the toilet be still standing today when there is not an iota of evidence of the buildings being constructed for the second time? I accept SP1's evidence that the thirteen shop lots and the toilet had been completed in the year 1988 before the MPPP's approval and they are still standing on the said land today. The plaintiff was allowed possession of them and had been renting out the said shop lots to tenants throughout those many years without any interference by the defendant until such time when the plaintiff was required to resubmit the same plans for MPPP's approval after the first rejection and the refusal by the defendant to sign on the same plans alleging the termination of the tenancy agreement P4 and the denial of any equity in favour of the plaintiff that the dispute arose. However, the defendant had been before that happily receiving the ground rent for that portion of land where those thirteen shop lots and the toilet were erected from the plaintiff. It is untrue when the defendant said that the plaintiff had since 1 October 1993 been occupying that portion of the said land without paying rent but that it was the defendant which had refused to accept the rental tendered contending that the tenancy had been terminated. From 1988 till 1993 when the defendant alleged that the tenancy agreement P4 had been terminated by them, the thirteen shop lots and the toilet had been standing on the defendant's said land and yet no action had been taken by the defendant against the plaintiff. I have no doubt upon a finding of facts that such inaction by the defendant only goes to show that the defendant knew very well that the plaintiff had been encouraged and given consent or approval by the defendant to construct the thirteen shop lots and a toilet on the defendant's said land as well as condoning the fact that plaintiff had built the said shop lots and toilet without prior approval of the MPPP. Further, the contention that the defendant had terminated the tenancy agreement P4 is unsustainable because the defendant was never a party and hence not privy to the contract *vide* P4 which was entered between Yeap Boon Lee not for and or on behalf of the defendant but in his personal capacity and the plaintiff. The defendant was therefore in no position to terminate the said tenancy agreement; secondly as this court has found above, P4 was a tenancy for the premises No. 388-A and not in relation to the said land and or any part thereof. The ground tenancy was a

separate issue. Since the defendant is not privy to the said agreement P4, the defendant cannot claim any right under or rely on the terms and conditions of P4 to enforce them. The privity of contract under the English common law as propounded in *Tweddle v. Atkinson* (1861) 1 B & S 393 which was endorsed by the House of Lords in *Dunlop Pnuematic Tyre Company Limited v. Selfridge and Company Limited* [1915] AC 847 HL, and *Scruttons Ltd v. Midland Silicones Ltd* [1962] AC 446, HL is that only a person who is a party to a contract can sue or be sued on it. In *Scruttons Ltd (supra)*, Lord Reid observed:

> ... I find it impossible to deny the existence of the general rule that a stranger to a contract cannot in a question with either of the contracting parties take advantage of provisions of the contract even where it is clear from the contract that some provision in it was intended to benefit him. That rule appears to have been crystallized a century ago in *Tweddle v. Atkinson* [1861] 1 B & S 393, and finally established in this House of Lords in *Dunlop Pnuematic Tyre Co. Ltd v. Selfridge & Co. Ltd* [1915] AC 847.

[14] The common law position in Malaysia is nonetheless the same as the English common law as clearly explained by the Privy Council in *Kepong Prospecting Ltd & Ors v. Schmidt* [1967] 1 LNS 67 PC as follows (as cited by the learned author Cheong May Fong in *Contract Law in Malaysia* at p. 101):

> The real question which arises as to this agreement is whether it could be enforced by Schmidt who in his personal capacity was not a party to it ... if the agreement were governed by English Law, Schmidt would be unable to enforce it ... But it was suggested that in this respect the law of Malaysia differed from the law of England in admitting the principle of *jus quaesitum tertio* ... Their Lordships were not referred to any statutory provision by virtue of which it could be said that the Malaysian law as to contracts differs is so important a respect from English law. It is true that section 2(d) of the Contracts (Malay States) Ordinance gives a wider definition of "consideration" than that which applies in England particularly in that it enables consideration to move from another person than the promise, but the appellant was unable to show how this affected the law as to enforcement of contracts by third parties, and it was not possible to point to any other provision having this effect. On the contrary paragraphs (a), (b), (c) and (e) support the English conception of a contract as an agreement on which only the parties to it can sue.

[15] It is therefore clear that the defendant being a third party to the contract tenancy P4 cannot enforce the contract even if it is made or some of the provisions in P4 were intended for its benefit; see also *Punca Klasik Sdn Bhd v. Foh Chong & Sons Sdn Bhd & Ors* [1998] 1 CLJ 601. Consequently, I hold that the defendant's purported action basing on the terms and conditions in P4 which included the right to extend or terminate it is wrong in law and of no effect which ought to be rejected.

[16] On the facts and circumstances of this case, was the plaintiff protected by equity? Although the plaintiff had pleaded protection under equity, the doctrine of equitable estoppel or proprietary estoppel were not specifically stated but the facts pleaded nevertheless show that by the defendant's then directors' encouragement which induced the plaintiff to expense money to build the thirteen shop lots and the toilet at their own costs and expenses under the expectation that the plaintiff could use and/or let out the premises until such time when they could develop jointly the said land, the plaintiff, to this court, had pleaded material facts indicating that equitable principle should operate to protect plaintiff and to do justice of the case. The defendant contended that estoppel was not pleaded by the plaintiff. I find the fact that the plaintiff having pleaded equity and the facts leading to the doctrine of proprietary estoppel, plaintiff had indeed pleaded sufficient material facts which attract the application of the equitable doctrine. The defendant in that sense, is not prejudiced at all. I do not find this contention tenable. From the facts and evidence of the case, the plaintiff upon consent and encouragement by the defendant, had expended their own costs and expenses to build the thirteen shop lots and a toilet on the defendant's land; the plaintiff had acted to their detriment on the expectation that they could remain on the land until such time when both parties were to jointly develop the land. This coupled with the fact that ground rental for that portion of the said land had been paid and received by the defendant, I find upon such facts that a lease had indeed existed between the plaintiff and the defendant over that portion of the said land where the aforesaid buildings were erected and both the plaintiff and the defendant are bound by such a lease for the period as stipulated in s. 221(3)(b), *(infra)* National Land Code which is 30 years. Indeed, the fact that the defendant had offered to rent that portion of the said land to the plaintiff to build upon payment of ground rental and the plaintiff had accepted by building and paying the agreed

ground rent, established clearly a concluded contract. Since the defendant did not stipulate the duration of the tenancy, pursuant to s. 221(3)(b)*(supra)*, it has created a lease of 30 years when it involves part of the alienated land. I find that there is a valid lease between the parties herein. Further, I find the facts of the case may also encompass the equitable principle of proprietary estoppel which I consider below.

[17] The initial doctrine of proprietary estoppel was developed in the case of *Willmott v. Barber* [1880] 15 Ch D 96 by Fry J. In *Crabb v. Arun District Council* [1976] Ch 179, [1975] 3 All ER 865 CA, Scarman LJ in adopting the preconditions laid down by Fry J in *Willmott v. Barber* had stated the five points to be established in order to succeed in a plea of equitable estoppel as follows:

(i) the plaintiff must have made a mistake as to his legal rights;

(ii) the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief;

(iii) the defendant, the possessor of the legal right which the plaintiff claims it would be inequitable for the defendant to enforce, must have known of the existence of his own right which is inconsistent with the right claimed by the plaintiff;

(iv) the defendant must have known of the plaintiff's mistaken belief of his right; and

(v) the defendant must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right.

[18] In *Dillwyn v. Llewelyn* (1862) 4 De GF & J 517, a father allowed his son into possession of land and purported to convey the land to the son though the conveyance was ineffective as it was not contained in a deed. In reliance of the mistaken belief that the land was his, the son spent £14,000 on building a house on the land which the father encouraged him to do. It was held that the son was entitled to have the land conveyed to him.

[19] However, with the evolvement of this equitable principle, the English courts have exercised a wide discretion to take whatever steps appropriate in the case to satisfy the equity created by the estoppel and the current trend is against the rigid application of the five criteria above-quoted.

[20] In *Taylor Fashions Ltd v. Liverpool Victoria Trustees Co Ltd* [1981] 1 All ER 897, 915, Oliver J said:

> The application of the principle requires a very much broader approach which is directed to ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment.

[21] In *Grant v. Edwards* [1986] 2 All ER 426, Browne-Wilkinson VC stated:

> In many cases it is impossible to say whether or not the claimant would have done the act relied on as a detriment even if she thought she had no interest in the house ... Once it has been shown that there was a common intention that the claimant should have an interest in the house, any act done by her to her detriment relating to the joint lives of the parties is sufficient detriment to qualify. The acts do not have to be inherently referable to the house. The holding out to the claimant that she had a beneficial interest in the house is an act of such a nature as to be part of the inducement to her to do the acts relied on. Accordingly, in the absence of evidence to the contrary, the right inference is that the claimant acted in reliance on such holding out and the burden lies on the legal owner to show that she did not do so.

[22] In *Greasley v. Cooke* [1980] 3 All ER 710 CA, Dunn LJ stated the orthodox view that for proprietary estoppel to arise the person claiming must have incurred expenditure or otherwise have prejudiced himself or acted to his detriment. However, Lord Denning MR did not think that that was necessary saying that it would suffice if the party to whom the assurance was given acted on the faith of it in such circumstances that it would be unjust and inequitable for the party making the assurance to go back on it.

[23] On the facts of the instant case, the chairman and director of the defendant had encouraged and consented to the plaintiff to build the thirteen shop lots and the toilet on that portion of the land in front of premises No. 388-A, and agreed on a tenancy until such time when the said land was sold or jointly developed by the plaintiff and the defendant when the plaintiff declined to buy the land at the offer price of RM28 per sq. ft. and disregarding the fact of the loans allegedly given by the plaintiff to the defendant to settle the arrears of quit rent and to the

defendant's chairman, Yeap Geok Kee to take care of his financial problems, the plaintiff had on the expectation of the lease expended on their own money to build the thirteen shop lots and the toilet thereon thereby acting to their detriment in reliance of the defendant's encouragement. The plaintiff had since been in possession and had also been paying ground rental to the defendant. It is thus unjust and inequitable for the defendant to resile from the original intention of both parties to create a lease of unspecified period until the said land is sold or jointly developed by both parties. Digressing to the question of admissibility of the letter dated 3 October 1987 (bundle B p. 55) from the defendant to the plaintiff allegedly signed by the Managing Director, Yeap Boon Lee, which narrated *inter alia* the admission of the sum of RM45,000 having been received by the chairman of the defendant, to settle the arrears owed to the land office and the sum of RM275,000 to pay his debts, granting the plaintiff the first option to buy the said land, the defendant agreeing to repay the plaintiff RM575,000 in the event the plaintiff would not buy the said land and the said land was sold, allowing the plaintiff to erect buildings on the said land and the defendant's chairman agreeing to sign all plans of the buildings, such contents would definitely corroborate the evidence of SP1 in all material aspect and perhaps account for the reasons why the defendant then had granted unreserved consent and encouragement to the plaintiff to build on the said land. Learned counsel for the plaintiff submitted that since the signatory Yeap Boon Lee had died, this letter can be admitted under s. 32(1)(b) of the Evidence Act 1950 being statement made in the ordinary course of business, or under ss. 17-20 being admission and s. 31 being admissions though not conclusive proof that may operate to estop. Learned counsel for the defendant conversely submitted that the fact of the existence of this letter had not been pleaded by the plaintiff and the plaintiff cannot attempt to contradict the tenancy agreement P4 by this letter citing s. 91 and 92 of the Evidence Act 1950. Looking through the plaintiff's amended statement of claim, I find no fact of this letter and the two alleged loans to the chairman of the defendant were pleaded therein although the fact of the plaintiff being allowed or encouraged to build on the said land and the defendant's chairman Yeap Geok Kee consenting to sign all plans of the buildings were duly pleaded. In the circumstances, I find no necessity to deal with the provisions of ss. 32(1)(a), 17-20, 31, 91-92 of the Evidence Act 1950 but to confine to say the very fundamental that parties are bound by their own pleadings (*Yew*

Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330; *Tan Leng Choo & Ors v. Law Teck Huat* [2008] 1 LNS 568). To allow this letter to be admitted, to this court, will not only allow the facts pleaded ie, the construction of building and signing of the plans but also the unpleaded admission of debts by the defendant through its then chairman where this court is of the view that the prejudicial effect seems to outweigh its probative value. The plaintiff had never pleaded that nor claimed that the two loans of RM45,000 and RM275,000 were given to the defendant. Hence, this fact in this said letter being prejudicial to the defendant is irrelevant to be countenanced as an exhibit. Be that as it may, reverting to the issue, even with this letter in bundle B p. 55 being rejected as exhibit, it is nevertheless a clear fact that defendant through its chairman, Yeap Geok Kee, had clearly signed all the plans for the construction of the thirteen shop lots and the toilet which had been submitted to the MPPP for approval coupled with the conduct of the defendant allowing the construction and completion of the said building work on its said land without raising any objection as well as receiving the ground rent for the said portion of the said land where the thirteen shop lots and the toilet were erected, that suffice to show that the defendant had consented, approved and/or encouraged the plaintiff to do as they did to the plaintiff's detriment as it was never disputed that it was done at the plaintiff's own costs and expenses with the expectation of a lease of unspecified term ie, until they jointly developed the said land. I find that equity should operate to estop the defendant from seeking vacant possession of the said thirteen shop lots and the toilet. The doctrine of proprietary estoppel is also applicable to the protect plaintiff's equitable interest of the existence of a lease of unspecified duration over the thirteen shop lots and the toilet built by them with their own costs and expenses. Pursuant to s. 221(3)(b) of the National Land Code, the maximum term for which any lease may be so granted shall be thirty years if it relates to a part of any alienated land thereof. In *Yong Tong Hong v. Siew Soon Wah & Ors* [1971] 1 LNS 161, for example, the court construed the tenancy for 'as long as you wish' to be a 30 years lease under this provision for partial land and 99 years for the whole land. Sub-section (2) to s. 221 provides that every lease shall be for a term exceeding three years. Hence any term not exceeding three years will be a tenancy. In the circumstances, I find it just and

equitable to hold that there is a 30 years lease to the plaintiff pursuant to s. 221(3)(b) of the National Land Code for that portion of the said land where the thirteen shop lots and the toilet were built.

Second Issue

[24] The 'Perintah Termesti' was issued by the Magistrate's Court Georgetown on 24 July 1991 consequential to the defendant having been charged and having pleaded guilty to the offence of constructing the eight units of stores and one unit of toilet in the compound of premises No. 388-A under s. 70(13)(c) of the Street, Drainage and Building Act 1974. The undisputed evidence is that the thirteen shop lots and the toilet, which are also known as the aforesaid eight lots of stores and the one unit of toilet in the said Mandatory Order, (para. 15 (1)(a) amended statement claim at pp. 26-27 bundle A), were built prior to obtaining approval from the MPPP. Legally speaking, the said buildings constructed without the building plans etc, being duly approved by MPPP, are illegal structures and the order of the learned Magistrate to demolish such illegal structures consequent to defendant having pleaded guilty to the aforesaid charge would seem to be in line with s. 70(15) of the same Act 1974. However, if this order of the Magistrate's Court were to be carried out which the defendant would very much want to, it would defeat the equity which protects the plaintiff's right over the said buildings and the whole of the plaintiff's claim would fall as the substratum of their whole claim is no longer in existence. Evidence shows that MPPP had, upon the plaintiff's appeal, requested the resubmission of the same set of building plans etc, for consideration. If the defendant had signed the same set of the plans for the resubmission at the material time, MPPP would probably have approved them to render the buildings legal structures. However, if MPPP had upon reconsideration presumably rejected and refused approval, it would then be fair to assume that such order is proper. That is not the case here. In the absence of such reconsideration by MPPP upon the failure or refusal of the defendant to sign those plans and the resubmission, I find it inequitable to allow this order dated 24 July 1991 to stand to defeat the equity that is in favour of the plaintiff. In the circumstances, it is only just and equitable that this order ought to be suspended until the resubmission and final consideration of the building plans etc by the MPPP. I must emphasise here that this court can only suspend the said order pending the final

consideration by MPPP but this court cannot compel MPPP to grant approval of the same set of plans which is the sole administrative power of the said local authority for which they are yet to exercise.

Third Issue

[25] Upon the finding of this court on the first issue above on the existence of a lease between the plaintiff and the defendant and or the plaintiff's right under equity over the thirteen shop lots and the toilet which I reiterate herein, I hold that it is unjust and inequitable for the defendant to have vacant possession of the said portion of the said land where those buildings were erected. As to the sum of RM13,698 in the counterclaim being the increase in quit rent, I find that the defendant had failed to prove any agreement between the plaintiff and the defendant to the effect that the plaintiff agreed to pay to the defendant any increase in the quit rent in respect of the said portion of the said land. As this court has found above, defendant is not privy to the tenancy agreement P4 and hence is in no position being a non-party to P4 to rely on any of the terms and conditions therein as a foundation of their claim. On the question of the allegation of trespass and damages thereof, evidence of this case on a positive finding of facts, show that the defendant by allowing the plaintiff to build the said buildings on the land at their own costs and expenses with payment of ground rental to the defendant until such time when the parties have jointly developed the said land and the defendant having accepted the rent condescendingly, had created a lease with the plaintiff in contract and/or in equity with possession granted; there is therefore no question of trespass. I do not find any merit in this allegation of trespass. It is utterly unjust and inequitable for defendant to allege trespass by the plaintiff when the defendant had encouraged and allowed the plaintiff to build and occupy the said land. Consequently, the issue of damages for trespass does not arise. On a balance of probabilities, I hold that the defendant had failed to prove their counterclaim against the plaintiff.

Conclusion

[26] For the foregoing reasons and on a balance of probabilities upon findings of facts, I hold that the plaintiff had proved their case against the defendant. Therefore, I allow the plaintiff's claim in respect of prayers (1)(a)-(d) of para. 15 of the amended

statement of claim and para. (1)(e) of the same para. 15 for a lease of 30 years pursuant to s. 221(3)(b) of the National Land Code commencing from 1 January 1988 but subject to the building plans etc, having been approved by the MPPP. However, if MPPP should disapprove the said plans submitted which render the building illegal, equity will not protect the plaintiff for their illegal structures erected thereon the defendant's land and this lease shall be terminated upon the final decision of MPPP disapproving the plans upon any appeal for reconsideration if any. If approval is duly granted by MPPP, the balance period of the lease shall become effective and plaintiff shall pay RM2,500 per month as ground rent to the defendant until the expiration of the balance period of the lease. Prayer 15(1)(f) is allowed partially that the 'Perintah Termesti' dated 24 July 1991 of the learned Magistrate is ordered to be suspended pending and until the final consideration and decision, upon the resubmission of building plans, by MPPP. With the suspension of the said 'Perintah Termesti', there is no necessity to grant further injunction as prayed for in para. 15(1)(g) of the amended statement of claim. Costs of this action is allowed at RM15,000 to the plaintiff. The defendant's counterclaim is dismissed with cost of RM5,000.

A B C D E F G H I